

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

MICHAEL WITKIN,

No. 2:05-cv-01662-MCE-DAD

Plaintiff,

v.

MEMORANDUM AND ORDER

COUNTY OF SACRAMENTO, THE  
SACRAMENTO COUNTY SHERIFF'S  
DEPARTMENT, SHERIFF LOU  
BLANAS, THE CITY OF ELK GROVE  
and SACRAMENTO COUNTY  
SHERIFF'S DEPUTY ROBERT BARNES  
acting as an ELK GROVE POLICE  
OFFICER and DOES 1 through 25,  
inclusive,

Defendants.

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This case arises from the events surrounding the arrest of  
Plaintiff Michael Witkin ("Plaintiff") on August 21, 2004.  
Plaintiff alleges that his constitutional rights were violated by  
Defendants<sup>1</sup> during said arrest and now seeks recovery under 42  
U.S.C. section 1983.

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<sup>1</sup> The Defendants in this matter include the County of  
Sacramento, the Sacramento County Sheriff's Department, Sheriff  
Lou Blanas, the City of Elk Grove, and Sacramento County  
Sheriff's Deputy Robert Barnes. Hereinafter all defendants will  
be referred to collectively as "Defendants".

1 Plaintiff also asserts state tort claims for battery and  
2 negligence. This matter is now before this Court on Defendants'  
3 Motion for Summary Judgment pursuant to Federal Rule of Civil  
4 Procedure 56.<sup>2</sup>

5  
6 **BACKGROUND**  
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8 In the early morning of August 21, 2004, Deputy Robert  
9 Barnes witnessed Plaintiff drive past him at a high rate of  
10 speed. Deputy Barnes followed Plaintiff until Plaintiff pulled  
11 partially into the driveway of a residence that later turned out  
12 to be Plaintiff's home. Defendants assert that Deputy Barnes  
13 yelled "stop, police" at Plaintiff. According to Plaintiff,  
14 Deputy Barnes did not say anything to Plaintiff at that point and  
15 Plaintiff did not know he had been followed by a police officer.

16 Plaintiff then entered the residence and Deputy Barnes  
17 followed Plaintiff. The two men struggled in the foyer of the  
18 residence. According to Plaintiff, he did not see a police car  
19 pull up behind him and did not know Deputy Barnes was a police  
20 officer. According to Defendants, the deputy tried to detain  
21 Plaintiff. According to Plaintiff, the deputy did not try to  
22 detain him, but rather struck him in the head.

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26 <sup>2</sup> Unless otherwise stated, all further references to a  
"Rule" are to the Federal Rules of Civil Procedure.

27 Because oral argument will not be of material assistance,  
28 the Court orders this matter submitted on the briefing. E.D.  
Cal. Local Rule 78-230(h).

1 A fight ensued and the two men rolled down two stairs and  
2 landed on a carpeted landing area in the house. The two men  
3 continued to fight as Deputy Barnes attempted to gain control of  
4 Plaintiff and stop him from getting away.

5 According to Defendants, Plaintiff ended up on top of Deputy  
6 Barnes and began pulling on Barnes' radio and gun. In addition,  
7 Deputy Barnes claims he saw Plaintiff crouch and grab something  
8 off the carpet.

9 According to Plaintiff, Plaintiff was able to break free of  
10 the deputy and ran out of the house. Plaintiff alleges that at  
11 no time did he grab for Barnes' gun or radio nor did he grab  
12 something off the carpet.

13 The struggle between Plaintiff and Deputy Barnes continued  
14 into the front yard. At some point, the two men separated.  
15 Plaintiff recalls fleeing in an attempt to find safety from his  
16 then-unknown assailant. Deputy Barnes recalls seeing Plaintiff  
17 crouch and look back over his shoulder at him. Deputy Barnes  
18 also recalls seeing Plaintiff reach toward his waist area and  
19 thinking that Plaintiff was reaching for a weapon and was about  
20 to deliver rounds in his direction and attempt to kill him.

21 Deputy Barnes drew his weapon and fired upon Plaintiff  
22 hitting him three times in the back, hip, and buttocks.  
23 Nonetheless, Plaintiff continued to run down the street.  
24 Additional officers arrived at the scene and eventually  
25 determined that Plaintiff returned to the residence where the  
26 fight originally occurred. Approximately two hours later,  
27 Plaintiff exited the residence and was arrested.

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1 After a jury trial, Plaintiff was convicted of resisting  
2 arrest through use of threats and violence under California Penal  
3 Code section 69 and battery against a police officer under  
4 California Penal Code section 243(b).<sup>3</sup>

5 Plaintiff brought this civil action alleging that Deputy  
6 Barnes used excessive force in shooting Plaintiff and that the  
7 excessive force employed was caused by deliberate indifference on  
8 the part of the Sacramento County Sheriff's Department in the  
9 training of its officers.<sup>4</sup> In addition to his constitutional  
10 claims under 42 U.S.C. § 1983, Plaintiff asserts state tort  
11 claims for battery and negligence. Defendants now move for  
12 summary judgment on Plaintiff's claims.

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14 **STANDARD**  
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16 The Federal Rules of Civil Procedure provide for summary  
17 judgment when "the pleadings, depositions, answers to  
18 interrogatories, and admissions on file, together with  
19 affidavits, if any, show that there is no genuine issue as to any  
20 material fact and that the moving party is entitled to a judgment  
21 as a matter of law." Fed. R. Civ. P. 56(c). One of the  
22 principal purposes of Rule 56 is to dispose of factually  
23 unsupported claims or defenses. *Celotex Corp. v. Catrett*,  
24 477 U.S. 317, 325 (1986).

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26 <sup>3</sup> Unless otherwise stated, all further references to a  
"Penal Code" are to the California Penal Code.

27 <sup>4</sup> Sacramento County provides a number of its sheriff's  
28 deputies to the City of Elk Grove pursuant to a law enforcement  
services contract between the city and county.

1 Under summary judgment practice, the moving party  
2 always bears the initial responsibility of informing  
3 the district court of the basis for its motion, and  
4 identifying those portions of 'the pleadings,  
5 depositions, answers to interrogatories, and admissions  
6 on file together with the affidavits, if any,' which it  
7 believes demonstrate the absence of a genuine issue of  
8 material fact.

9  
10 *Id.* at 323 (quoting Rule 56(c)).

11 If the moving party meets its initial responsibility, the  
12 burden then shifts to the opposing party to establish that a  
13 genuine issue as to any material fact actually does exist.

14 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574,  
15 585-87 (1986); *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S.  
16 253, 288-89 (1968).

17 In attempting to establish the existence of this factual  
18 dispute, the opposing party must tender evidence of specific  
19 facts in the form of affidavits, and/or admissible discovery  
20 material, in support of its contention that the dispute exists.  
21 Fed. R. Civ. P. 56(e). The opposing party must demonstrate that  
22 the fact in contention is material, i.e., a fact that might  
23 affect the outcome of the suit under the governing law, and that  
24 the dispute is genuine, i.e., the evidence is such that a  
25 reasonable jury could return a verdict for the nonmoving party.

26 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 251-52  
27 (1986); *Owens v. Local No. 169, Assoc. of W. Pulp and Paper*  
28 *Workers*, 971 F.2d 347, 355 (9th Cir. 1987).

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1 Stated another way, "before the evidence is left to the jury,  
2 there is a preliminary question for the judge, not whether there  
3 is literally no evidence, but whether there is any upon which a  
4 jury could properly proceed to find a verdict for the party  
5 producing it, upon whom the onus of proof is imposed." *Anderson*,  
6 477 U.S. at 251 (quoting *Improvement Co. v. Munson*, 14 Wall. 442,  
7 448, 20 L. Ed. 867 (1872)). As the Supreme Court explained,  
8 "[w]hen the moving party has carried its burden under Rule 56(c),  
9 its opponent must do more than simply show that there is some  
10 metaphysical doubt as to the material facts .... Where the record  
11 taken as a whole could not lead a rational trier of fact to find  
12 for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 586-87.

14 In resolving a summary judgment motion, the evidence of the  
15 opposing party is to be believed, and all reasonable inferences  
16 that may be drawn from the facts placed before the court must be  
17 drawn in favor of the opposing party. *Anderson*, 477 U.S. at 255.

## 19 ANALYSIS

### 21 1. Plaintiff's section 1983 claims are barred by *Heck*.

23 In *Heck v. Humphrey*, 512 U.S. 477, 487 (1994), the United  
24 States Supreme Court held that:

25 when a state prisoner seeks damages in a section 1983  
26 suit, the district court must consider whether a judgment  
27 in favor of the plaintiff would necessarily imply the  
28 invalidity of his conviction or sentence; if it would,  
the complaint must be dismissed unless the plaintiff can  
demonstrate that the conviction or sentence has already  
been invalidated.

1 Thus, in order to pursue a claim under 42 U.S.C. § 1983 that  
2 would undermine a prior conviction, Plaintiff must prove that the  
3 underlying conviction has been "reversed on direct appeal,  
4 expunged by executive order, declared invalid by a state tribunal  
5 . . . , or called into question by a federal court's issuance of a  
6 writ of habeas corpus." *Heck*, 512 U.S. at 486-477.

7 Here, Plaintiff was convicted of battery on a peace officer  
8 and deterring a police officer from the performance of his  
9 duties. Plaintiff has presented no evidence that these  
10 convictions has been reversed or invalidated. In fact, Witkin  
11 appealed his conviction and that appeal was denied.

12 Defendants contend that Plaintiff's First and Second Causes  
13 of Action, alleging excessive force and deliberate indifference  
14 respectively under section 1983, are barred under *Heck* because a  
15 verdict in Plaintiff's favor would necessarily imply the  
16 invalidity of his criminal conviction which was upheld on appeal  
17 and had not otherwise been rendered invalid. Plaintiff argues  
18 that his claims are unrelated to the conduct for which he was  
19 convicted and, therefore, summary judgment is inappropriate.  
20 Specifically, Plaintiff contends that a verdict in his favor on  
21 his excessive force and deliberate indifference claims would not  
22 necessarily be inconsistent with his prior conviction under Penal  
23 Code sections 69 and 243(b). The Court disagrees.

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1 Plaintiff relies primarily on the Ninth Circuit cases of  
2 *Sanford v. Motts*, 258 F.3d 1117 (9th Cir. 2001), and *Smith v.*  
3 *City of Hemet*, 394 F.3d 689 (9th Cir. 2005), for the proposition  
4 that *Heck* does not necessarily bar a section 1983 action for  
5 excessive force where the plaintiff was convicted of resisting  
6 arrest if the excessive force was applied either prior or  
7 subsequent to the arrest.<sup>5</sup>

8 In *Sanford*, the plaintiff brought an excessive force claim  
9 against a police officer after she pled no lo contendere to  
10 resisting, obstructing and delaying a peace officer in the  
11 performance of his duties under Penal Code section 148(a)(1).  
12 *Sanford*, 258 F.3d at 1118-19. Because the court could not  
13 ascertain the factual basis for the plea, and because there were  
14 several accusations which would support a conviction under  
15 section 148(a)(1), the court could not determine whether the  
16 excessive force occurred prior to the arrest or subsequent  
17 thereto. Further, because excessive force applied subsequent to  
18 the arrest would not render the arrest unlawful, the court found  
19 that defendants had not met their burden to show that the  
20 excessive force claims were barred by *Heck*. *Id.* at 1119-20.

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24 <sup>5</sup> *Sanford* and *Smith* both involved Penal Code section  
25 148(a)(1), which prohibits a person from "resist[ing],  
26 delay[ing], or obstruct[ing] any public officer . . . in the  
27 discharge [of] any duty of his or her . . . employment." Penal  
28 Code section 69, the statute in the instant case, prohibits a  
person from resisting, by use of force or violence, an officer in  
the performance of his duty. While the language of the two  
sections differs slightly, the Court believes the statutes are so  
similar that the analysis under *Heck* is the same.



1        *Smith* held that a conviction based on conduct that occurred  
2 before an officer commences the process of arrest is not  
3 necessarily rendered invalid by the officer's subsequent use of  
4 excessive force in making the arrest. *Id.* at 696. In *Smith*, the  
5 plaintiff pled guilty to resisting arrest under section  
6 148(a)(1). *Smith* also involved chain of events where several of  
7 the defendants' acts provided a basis for the plaintiff's  
8 conviction. The court found that the plaintiff violated section  
9 148(a)(1) several times before the arrest, as well as during the  
10 course of the arrest. *Smith*, 394 F.3d at 697. As in *Sanford*,  
11 the court found that nothing in the record informed them of the  
12 factual basis of the guilty plea. *Smith*, 394 F.3d at 698.  
13 Because the defendants' acts prior to the application of  
14 excessive force could have supported the conviction, the court  
15 could not determine that the excessive force claim would  
16 necessarily undermine his conviction. Therefore, the court held  
17 that summary judgment was not appropriate. *Id.* at 699.

18        Based on these arguments, Plaintiff contends that his claims  
19 are not barred by *Heck* because the record shows that his  
20 conviction was based solely on his conduct prior to the shooting.  
21 This argument is without merit.

22        In *Smith*, the Ninth Circuit carefully distinguished  
23 convictions based on guilty pleas or pleas of no lo contendere  
24 from convictions based on jury verdicts.

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1 Where a defendant is charged with a single-act offense  
2 but there are multiple acts involved each of which  
3 could serve as the basis for a conviction, a jury does  
4 not determine which specific act or acts form the basis  
5 for the conviction. ... Thus, a jury's verdict  
6 necessarily determines the lawfulness of the officers'  
7 actions throughout the whole course of the defendant's  
8 conduct, and any action alleging the use of excessive  
9 force would necessarily imply the invalidity of his  
10 conviction. ... However, where a § 1983 plaintiff has  
11 pled guilty or entered a plea of no lo contendere ...  
12 it is not necessarily the case that the factual basis  
13 for his conviction included the whole course of his  
14 conduct.

9 *Smith*, 394 F.3d at 699, fn.5 (internal quotations and citations  
10 omitted). Because Plaintiff was convicted by a jury, that jury  
11 must have necessarily determined the lawfulness of Deputy Barnes'  
12 actions throughout the entire course of Plaintiff's conduct.  
13 Therefore, Plaintiff's claims of excessive force and deliberate  
14 indifference as to the application of unreasonable force would  
15 both imply the invalidity of Plaintiff's conviction.

16 Further, Plaintiff's argument that his conviction was based  
17 solely on actions occurring prior to the shooting is not  
18 compelling. In support of this argument, Plaintiff cites this  
19 Court's previous Memorandum and Order on Defendants' Motion to  
20 Dismiss. In that Order, this Court found some evidence that the  
21 Plaintiff's conviction was based on conduct prior to the  
22 shooting. Namely, this Court referred to the prosecutor's  
23 statements to the jury that the jury should not consider whether  
24 excessive force was used. While this Court found that evidence  
25 sufficient to overcome a motion to dismiss, standing alone it  
26 does not overcome a motion for summary judgment.

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1 The jury was instructed that statements made by attorneys  
2 are not evidence. It is undisputed that the jury was presented  
3 with evidence that Deputy Barnes shot the Plaintiff. It is  
4 undisputed that the jury was instructed that the People had the  
5 burden of proving that the peace officer was engaged in the  
6 performance of his duties. Finally, it is undisputed that the  
7 jury was instructed that "[a] peace officer is not engaged in the  
8 performance of his duties if he ... uses unreasonable or  
9 excessive force in making or attempting to make the arrest." The  
10 jury received evidence of the shooting, was instructed on  
11 unreasonable and excessive force, and still convicted Plaintiff  
12 of resisting arrest. Pursuant to *Smith*, the jury must have  
13 necessarily decided the lawfulness of Deputy actions throughout  
14 the entire course of the arrest. 394 F.3d at 699, fn.5.

15 Plaintiff's first cause of action is against all Defendants  
16 and alleges that Defendants used unreasonable and excessive force  
17 in shooting Plaintiff. Plaintiff's second cause of action is  
18 against all Defendants and alleges Defendants were deliberately  
19 indifferent as to a pattern and practice of the use of  
20 unreasonable force. The jury verdict convicting Plaintiff  
21 necessarily determined that Deputy Barnes did not use  
22 unreasonable or excessive force. As such, success on either of  
23 these claims would necessarily imply that Plaintiff's conviction  
24 was invalid. Therefore, these claims are barred by *Heck*.

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1 Defendants have met their burden of establishing that  
2 Plaintiff's section 1983 claims are barred by *Heck*. Because  
3 Plaintiff has failed to introduce evidence that his conviction  
4 was based solely on the conduct prior to the shooting, a verdict  
5 in his favor would necessarily impugn his prior conviction. As  
6 such, summary judgment as to these claims is granted.

7  
8 **2. State claims.**  
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10 Plaintiff also asserts state law claims for battery and  
11 negligence against all Defendants. Because summary judgment is  
12 being granted to all Defendants as to the federal claims, this  
13 Court may decline to exercise jurisdiction over the pendant state  
14 claims. 28 U.S.C. § 1367(c)(3).

15 These claims raise issues regarding California's extension  
16 of the *Heck* doctrine to tort claims, as well as issues of  
17 immunity under California's Government Code. The proper forum  
18 for these issues is the California state court system. Therefore,  
19 the state claims are dismissed without prejudice.

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**CONCLUSION**

Based on the foregoing, Defendants' Motion for Summary Judgment is GRANTED as to the section 1983 claims for excessive force and deliberate indifference. The state law claims for battery and negligence are dismissed without prejudice.<sup>6</sup> The Clerk of the Court is directed to close the file.

IT IS SO ORDERED.

Dated: September 26, 2007



MORRISON C. ENGLAND, JR.  
UNITED STATES DISTRICT JUDGE

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<sup>6</sup>Accordingly, Defendants' concurrently pending Motion to Strike Plaintiff's Disclosure of Expert Witness Information and/or Impose Sanctions to Preclude Expert Testimony is hereby rendered moot.